478 I

(27)

Supreme Court, U.S.
FILED
OCT 24 2006
OFFICE OF THE CLERK

No. 05-1120

In the Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
GREGORY G. GARRE
THOMAS G. HUNGAR
Deputy Solicitors General
MALCOLM L. STEWART
Assistant to the Solicitor General
JON M. LIPSHULTZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ROGER R. MARTELLA, JR.
Acting General Counsel
CAROL S. HOLMES
Attorney
Environmental Protection Agency
Washington, D.C. 20460

QUESTIONS PRESENTED

1. Whether petitioners have carried their burden of establishing standing to sue in this case.

2. Whether the Environmental Protection Agency (EPA) reasonably determined that it lacks authority under the Clean Air Act (CAA) to regulate greenhouse gas emissions for the purpose of addressing global climate change.

3. Whether, assuming that EPA is authorized by the CAA to regulate greenhouse gas emissions for the purpose of addressing global climate change, the agency reasonably exercised its discretion in declining to initiate a rulemaking to consider regulation of carbon dioxide and other greenhouse gas emissions from new motor vehicles.

TABLE OF CONTENTS

Page

Statement 1
Summary of argument 7
Argument 9
I. Petitioners lack Article III standing 10
A. Petitioners have failed to demonstrate that the regulation they seek is likely to affect climatic or environmental conditions in Massachusetts ... 13
B. Petitioners' predictions concerning the possible indirect effects of EPA regulation are too speculative to establish causation and redressability 14
C. Petitioners' accounts of previous regulatory undertakings are insufficient to establish standing 18
II. EPA reasonably concluded that the CAA does not authorize it to regulate emissions of greenhouse gases to address concerns about global climate change 20
A. Key provisions of the CAA cannot coherently be applied to greenhouse gas emissions 23
B. Various federal statutes reflect Congress's intent to obtain additional information before undertaking any regulation of greenhouse gas emissions 26
C. Regulation of greenhouse gas emissions within the United States would have potentially vast economic and political consequences 31
D. EPA's interpretation of the CAA's text is reasonable 33

TABLE OF CONTENTS—Continued: Page

III. EPA reasonably exercised its discretion in determining that, even if it possessed statutory authority in this sphere, it would decline to exercise that authority at the present time 35
A. Federal agencies have broad discretion to decline to initiate rulemakings, even when the governing law would authorize regulation 36
B. Section 202(a)(1) of the CAA does not impose any timetable for determining whether greenhouse gas emissions from new motor vehicles would meet the statutory endangerment standard 39
C. EPA's denial of the rulemaking petition in this case reflects a reasonable exercise of agency discretion 45
Conclusion 50

TABLE OF AUTHORITIES

Cases:

Action for Children's Television v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977) 36
Allen v. *Wright*, 468 U.S. 737 (1984) 17
American Horse Prot. Ass'n v. *Lyng*, 812 F.2d 1 (D.C. Cir. 1987) 38
American Lung Ass'n v. *Reilly*, 962 F.2d 258 (2d Cir. 1991) 43
ASARCO, Inc. v. *Kadish*, 490 U.S. 605 (1989) 17
Bennett v. *Spear*, 520 U.S. 154 (1997) 11
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 22

Cases—Continued: Page

Clingman v. *Beaver*, 544 U.S. 581 (2005) 12
DaimlerChrysler Corp. v. *Cuno*, 126 S. Ct. 1854 (2006) 10, 19
Davis v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989) 33
Ethyl Corp. v. *EPA*, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) 43, 47
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) ..... *passim*
General Motors Corp. v. *National Highway Traffic Safety Admin.*, 898 F.2d 165 (D.C. Cir. 1990) 37
Heckler v. *Chaney*, 470 U.S. 821 (1985) 37, 38, 45
Her Majesty the Queen in Right of Ont. v. *EPA*, 912 F.2d 1525 (D.C. Cir. 1990) 43, 44, 48
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 11, 16, 17, 20
Midwest Indep. Transmission Sys. Operator, Inc. v. *FERC*, 388 F.3d 903 (D.C. Cir. 2004) 37
Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 38, 39
NRDC v. *Thomas*, 885 F.2d 1067 (2d Cir. 1989) 44
NRDC v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979) 37
National Ass'n of Regulatory Util. Comm'rs v. *DOE*, 851 F.2d 1424 (D.C. Cir. 1988) 37
National Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 125 S.Ct. 2688 (2005) 23
National Mining Ass'n v. *United States Dep't of the Interior*, 70 F.3d 1345 (D.C. Cir. 1995) 37
New York Pub. Interest Research Group v. *Whitman*, 321 F.3d 316 (2d Cir. 2003) 43

Cases—Continued: Page

Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 21
Russello v. *United States*, 464 U.S. 16 (1983) 43
Sierra Club v. *EPA*, 292 F.3d 895 (D.C. Cir. 2002) 11, 12
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 11, 16, 17
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 20
Timpinaro v. *SEC*, 2 F.3d 453 (D.C. Cir. 1993) 37
United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 35
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 21
WWHT, Inc. v. *FCC*, 656 F.2d 807 (D.C. Cir. 1981) 37

Constitution, treaties, statutes and rules:

U.S. Const.:
Art. II, § 3, Cl. 4 (Take Care Clause) 39
Art. III 7, 8, 10, 11, 12, 19
Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature*, Mar. 16, 1998, 37 I.L.M. 32 30
Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29 30
Clear Air Act, 42 U.S.C. 7401 *et seq.*:
42 U.S.C. 7403(g) (§ 103(g)) 26, 27, 35
42 U.S.C. 7403(g)(1) (§ 103(g)(1)) 26, 34, 35

Statutes and rules—Continued: Page

42 U.S.C. 7403(g)(1)-(4) 27
42 U.S.C. 7407(d) 23
42 U.S.C. 7407(d)(3) 42
42 U.S.C. 7408-7410 23
42 U.S.C. 7408(a)(1) 42
42 U.S.C. 7409(d)(1) 43
42 U.S.C. 7410(k) 42
42 U.S.C. 7411(b)(1)(A) 42
42 U.S.C. 7411(g) 42
42 U.S.C. 7412(a)(1) (§ 112(a)(1)) (1988) 44
42 U.S.C. 7412(b)(3) 42
42 U.S.C. 7412(b)(4) 42
42 U.S.C. 7415 (§ 115) 48
42 U.S.C. 7415(a) (§ 115(a)) 43
42 U.S.C. 7450 (1988) 29
42 U.S.C. 7450-7459 (1988) 29
42 U.S.C. 7453 (1988) 29
42 U.S.C. 7454 (1988) 29
42 U.S.C. 7456 (1988) 30
42 U.S.C. 7457 (1988) 30
42 U.S.C. 7501-7515 23
42 U.S.C. 7521-7590 (2000 & Supp. III 2003) 2
42 U.S.C. 7521 (§ 202) 33, 34
42 U.S.C. 7521(a) 20
42 U.S.C. 7521(a)(1) (§ 202(a)(1)) ..... *passim*
42 U.S.C. 7547(a) 42
42 U.S.C. 7548 42

Statutes and rules—Continued: Page

42 U.S.C. 7585(b)(2) 42
42 U.S.C. 7602 (§ 302) 2, 20
42 U.S.C. 7602(g) (§ 302(g)) 2, 33, 34
42 U.S.C. 7602(h) 2
42 U.S.C. 7607(b)(1) 5, 11
42 U.S.C. 7651k note 26
42 U.S.C. 7661a(i) (§ 502(i)) 43
42 U.S.C. 7661d(b)(2) 43
42 U.S.C. 7671-7671q 30
42 U.S.C. 7671a(e) (§ 602(e)) 26, 27
Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 821, 104 Stat. 2699 (42 U.S.C. 7651k note) 26, 27
Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 1601-1609, 106 Stat. 2999-3008 (42 U.S.C. 13381-13388) 28
§ 1604, 106 Stat. 3002 (42 U.S.C. 13384) 28
Energy Policy and Conservation Act, 49 U.S.C. 32901-32919 ..... 4, 24
49 U.S.C. 32902(a) 25
Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.* 21
Global Change Research Act of 1990, Pub. L. No. 101-106, Tit. I, 104 Stat. 3096 (15 U.S.C. 2921-2938) 28
15 U.S.C. 2931(a)(2) 28
15 U.S.C. 2931(b) 28
15 U.S.C. 2932 28

Statutes and rules—Continued: Page

Global Climate Change Prevention Act of 1990, Pub. L. No. 101-624, §§ 2401-2412, 104 Stat. 4058-4062 (7 U.S.C. 6701 *et seq.*) 28
§ 2403(a)(1), 104 Stat. 4059 (7 U.S.C. 6702(a)(1)) 28
Global Climate Protection Act of 1987, Pub. L. No. 100-224, §§ 1101-1106, 101 Stat. 1407-1409 (15 U.S.C. 2901 note) 27, 49
§ 1103(b), 101 Stat. 1408 28
§ 1104(2), 101 Stat. 1409 49
§ 1104(3), 101 Stat. 1409 ..... 28, 49
National Climate Program Act of 1978, 15 U.S.C. 2901 *et seq.* 27
15 U.S.C. 2904(d)(2) 27
Fed. R. App. P. 28(j) 12
D.C. Cir. R. (July 2006):
Rule 15(c)(2) 11
Rule 28(a)(7) 11

Miscellaneous:

Climate Change Fact Sheet (May 18, 2005) <http://www. state.gov/g/oes/rls/fs/46741.htm> 9
Council on Environmental Quality: Addressing Global Climate Change (visited Oct. 24, 2006) <http:// www.whitehouse.gov/ceq/global-change.html> 9

Miscellaneous—Continued: Page

EPA:

Climate Change: U.S. Climate Policy (visited Oct. 24, 2006) <http://www.epa.gov/climatechange> ... 9

Climate Change–U.S. Policy: International Cooperation (visited Oct. 24, 2006) <http://www.epa.gov/climatechange/policy/internationalcooperation.htm> ... 48

53 Fed. Reg. 30,566 (1988) ... 29

57 Fed. Reg. 33,754 (1992) ... 29

71 Fed. Reg. (2006):

p. 17,588 ... 25

p. 17,654 ... 24

Interview with Debra Saunders of San Francisco Chronicle (Oct. 11, 2006) <http://www.state.gov/secretary/rm/73913.htm> ... 31

News Release (July 11, 2006) <http://www.whitehouse.gov/ news/releases/2006/07/20060711-7.html> ... 9

S. Rep. No. 228, 101st Cong., 1st Sess. (1989) ... 30

U.N. Framework Convention on Climate Change, *Kyoto Protocol* (visited Oct. 24, 2006) <http://unfccc.int/essential_background/kyoto_protocol/items/2830.htm> ... 30, 31

In the Supreme Court of the United States

No. 05-1120

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT

This case involves a challenge to an administrative decision of the Environmental Protection Agency (EPA). EPA denied a rulemaking petition seeking regulation, pursuant to Section 202(a)(1) of the Clean Air Act (CAA or Act), 42 U.S.C. 7521(a)(1), of emissions of carbon dioxide and three other so-called "greenhouse gases" from new motor vehicles. EPA concluded that it lacked authority to undertake such regulation under the CAA. See Pet. App. A59-A80. EPA further determined that it would decline as a matter of discretion to exercise any such authority that it might possess. See *id.* at A80-A87. The court of appeals denied petitions for review that challenged EPA's decision. See *id.* at A1-A58.

1. Title I of the CAA focuses on stationary sources of air pollution, such as power plants. Title II of the Act establishes

a framework for federal control of pollution from motor vehicles and other mobile sources. See 42 U.S.C. 7521-7590 (2000 & Supp. III 2003). Section 202(a)(1) of the CAA, 42 U.S.C. 7521(a)(1), directs EPA to "prescribe * * * standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

Section 302 of the Act, 42 U.S.C. 7602, sets forth general definitions applicable to the CAA as a whole. The Act defines the term "air pollutant" to mean "any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air[,]" including any precursors to the formation of such air pollutant. 42 U.S.C. 7602(g). References in the CAA to "effects on welfare" include "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, and damage to * * * property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U.S.C. 7602(h).

2. On October 20, 1999, the International Center for Technology Assessment (ICTA) and several other parties filed a rulemaking petition asking EPA to regulate emissions of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons from new motor vehicles. J.A. 5-45. The petition alleged that emissions of those "greenhouse gases" from motor vehicles contributed to global climate change, satisfied the criteria for regulation under Section 202(a)(1) of the Act, 42 U.S.C. 7521(a)(1), and could feasibly be regulated by EPA. See J.A. 16-41. After soliciting and considering approximately 50,000 public comments, see Pet. App. A63, EPA denied the rulemaking petition, see *id.* at A59-A93.

a. EPA concluded that it lacked statutory authority to regulate the greenhouse gases at issue to address global climate change. Pet. App. A67, A68-A79.[1] EPA explained that this Court's decision in *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), "cautions agencies against using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues when Congress has specifically addressed those areas in other statutes." Pet. App. A68. EPA noted that the only provisions of the Act that specifically mention carbon dioxide or "global warming" are expressly nonregulatory in nature. *Id.* at A70-A71. It further explained that Congress had addressed another global atmospheric issue—stratospheric ozone depletion—by adding to the CAA a distinct set of provisions specifically tailored to that issue and its international dimensions. *Id.* at A71-A72. EPA noted in that regard that global climate change presents problems fundamentally different from those that the National Ambient Air Quality Standards—a central CAA mechanism for controlling pervasive air pollutants—were intended to or are capable of solving. *Id.* at A72-A73. EPA also observed that Congress had specifically addressed the subject of global climate change in legislation enacted outside the CAA framework, *id.* at A74, and had "declined to adopt other legislative proposals * * * to require [greenhouse gas] emissions reductions from stationary and mobile sources," *id.* at A74-A75.

---

[1] In denying ICTA's petition for rulemaking, EPA adopted the legal opinion of the agency's then-General Counsel, Robert E. Fabricant, "as the position of the Agency for purposes of deciding this petition and for all other relevant purposes under the CAA." Pet. App. A69. In that opinion, General Counsel Fabricant acknowledged that his legal conclusion reflected a departure from the position taken by two prior EPA general counsels in 1998 and 1999. See J.A. 120-123. Those general counsels had concluded that EPA possessed authority under the CAA to regulate greenhouse gas emissions, while emphasizing that the agency had no current intention of exercising that authority. See J.A. 54, 61-62, 71, 77, 79, 91, 98, 106, 108, 122-123.

EPA concluded that "the term 'air pollution' as used in the regulatory provisions [of the Act] cannot be interpreted to encompass global climate change," and that "[carbon dioxide] and other [greenhouse gases] are not 'agents' of air pollution and do not satisfy the CAA section 302(g) definition of 'air pollutant' for purposes of those provisions." Pet. App. A78. EPA also determined, however, that, "[e]ven if [greenhouse gases] were air pollutants generally subject to regulation under the CAA, Congress has not authorized the Agency to regulate [carbon dioxide] emissions from motor vehicles to the extent such standards would effectively regulate the fuel economy of passenger cars and light duty trucks." *Id.* at A79. EPA explained that at present, "the only practical way to reduce tailpipe emissions of [carbon dioxide] is to improve fuel economy." *Ibid.* The agency further concluded that the Energy Policy and Conservation Act (EPCA), 49 U.S.C. 32901-32919, which is administered by the Department of Transportation, was intended to serve as "the only statutory vehicle for regulating the fuel economy of cars and light duty trucks," and that EPCA therefore precluded any EPA regulation of carbon dioxide emissions that would effectively regulate the fuel economy of vehicles subject to EPCA. Pet. App. A79; see *id.* at A87 (explaining impracticality of other suggested methods of controlling carbon dioxide emissions).

b. EPA alternatively determined that it would deny the petition for rulemaking even if the CAA authorized it to regulate greenhouse gas emissions in order to address global climate change. EPA noted that "the CAA provision authorizing regulation of motor vehicle emissions does not impose a mandatory duty on the Administrator to exercise her judgment," but instead confers "discretionary authority." Pet. App. A80. EPA also observed that no EPA Administrator had yet made a finding that the standard for regulation under Section 202(a)(1) of the CAA (*i.e.*, that air-pollutant emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endan-

ger public health or welfare," 42 U.S.C. 7521(a)(1)) had been satisfied with respect to carbon dioxide or other greenhouse gas emissions. Pet. App. A81.

Based in large part on a report issued in 2001 by the National Academies' National Research Council (NRC), EPA identified numerous areas of scientific uncertainty as to the mechanisms of global climate change, its potential effects on human health and the environment, and effective responses. Pet. App. A82-A84. The agency also expressed the concern that regulation of greenhouse gas emissions from motor vehicles would "result in an inefficient, piecemeal approach to addressing the climate change issue" because "[t]he U.S. motor vehicle fleet is one of many sources of [greenhouse gas] emissions." *Id.* at A85. EPA further observed that "[u]nilateral EPA regulation of motor vehicle [greenhouse gas] emissions could also weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies." *Id.* at A86. The agency concluded that, "[u]ntil more is understood about the causes, extent and significance of climate change and the potential options for addressing it, EPA believes it is inappropriate to regulate [greenhouse gas] emissions from motor vehicles." *Ibid.*

3. Pursuant to 42 U.S.C. 7607(b)(1), numerous petitions for review of EPA's denial of the rulemaking petition were filed in the District of Columbia Circuit. On July 15, 2005, the court of appeals denied those petitions. Pet. App. A1-A58.

a. Judge Randolph, who announced the judgment of the court, declined to adopt EPA's position that petitioners lack standing to bring this case. Judge Randolph viewed the declarations submitted by petitioners to establish standing as sufficient to survive a motion for summary judgment, Pet. App. A8, but he observed that the record also contained evidence "contradict[ing] petitioners' claim that greenhouse gas emissions from new motor vehicles have caused or will cause a significant

change in the global climate," *id.* at A9. In Judge Randolph's view, it was not a sensible course of action either "to refer the standing issues to a special master for a factual determination" or "to remand to EPA for a factual determination of causation and redressability." *Ibid.* Judge Randolph concluded that, in light of the "factual overlap of the standing issues with EPA's justifications for not regulating greenhouse gases," it was appropriate "to proceed to the merits with respect to EPA's alternative decision not to regulate." *Ibid.*

On the merits, Judge Randolph assumed, arguendo, that EPA possessed statutory authority to regulate greenhouse gas emissions from new motor vehicles, but held that EPA had properly declined to exercise that authority. Pet. App. A10-A15. Judge Randolph noted the substantial scientific uncertainties in the current understanding of climate change. *Id.* at A12. He also emphasized that, because Section 202(a)(1) "directs the Administrator to regulate emissions that 'in his judgment' 'may reasonably be anticipated to endanger public health or welfare,'" it "gives the Administrator considerable discretion" to take into account "policy judgments" as well as "scientific evidence" in determining whether regulation of particular emissions is advisable. *Id.* at A13. Noting the array of policy concerns identified by EPA in its denial of the petition for rulemaking, see *id.* at A13-A14, Judge Randolph concluded that "the EPA Administrator properly exercised his discretion under § 202(a)(1) [42 U.S.C. 7521(a)(1)] in denying the petition for rulemaking," *id.* at A15.

b. Judge Sentelle concluded that the petitions for review should be dismissed because petitioners lacked standing. Pet. App. A16-A20. In his view, the impacts from global warming alleged by petitioners were too generalized to establish standing. *Id.* at A17-A18. To ensure that a majority of the panel could agree on a disposition of the case, however, Judge Sentelle accepted as law of the case the views of Judges

Randolph and Tatel that the court had jurisdiction to reach the merits. See *id.* at A19-A20. Because the judgment advocated by Judge Randolph (*i.e.*, that the petitions for review be denied) was "closest to that which [Judge Sentelle] would issue," Judge Sentelle joined in that disposition. *Id.* at A20.

c. Judge Tatel dissented. Pet. App. A21-A58. He concluded that at least one petitioner, the Commonwealth of Massachusetts, had established standing to sue. *Id.* at A27-A31. On the merits, Judge Tatel would have held that EPA possessed statutory authority to regulate greenhouse gas emissions from motor vehicles in order to address global climate change. *Id.* at A31-A42. Judge Tatel further concluded that the policy considerations identified by EPA did not justify the agency's refusal to initiate a rulemaking, and that the petition for review therefore should be granted. See *id.* at A44-A58.

SUMMARY OF ARGUMENT

The court of appeals properly denied petitioners' request to compel EPA to undertake regulation of greenhouse gas emissions from new motor vehicles at this time.

I. As a threshold matter, the petition for review is not suitable for judicial resolution because petitioners lack Article III standing. Petitioners have failed to carry their burden of establishing that they will be harmed by the specific agency action they challenge—EPA's decision not to regulate greenhouse gas emissions from new motor vehicles within the United States, which involves only a tiny fraction of global greenhouse gas emissions—or that their anticipated injuries would be materially alleviated by the judicial ruling they seek. Moreover, petitioners' theory of causation and redressability depends on predictions by their declarants that EPA regulation will set in motion an elaborate sequence of events involving independent choices by non-federal actors, including foreign governments.

Those predictions are far too speculative to establish Article III standing.

II. In any event, even if petitioners had established standing, EPA properly denied the petition for rulemaking. EPA reasonably concluded that it lacks authority to regulate greenhouse gas emissions from new motor vehicles in order to address global climate change. EPA recognized that key provisions of the CAA cannot coherently be applied to greenhouse gas emissions; that more recent laws reflect Congress's intent to assimilate more information as a predicate to legislation or international agreements to address global climate change; and that regulation of greenhouse gas emissions would have extraordinary economic and political ramifications. Under *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), those considerations amply support the agency's determination that the CAA's general provisions do not vest EPA with regulatory authority in this area.

III. EPA also reasonably declined to exercise any regulatory authority that it might possess in this sphere. Under background principles of administrative law, an agency's decision *not* to initiate a rulemaking may be based on a wide range of discretionary factors and is reviewed under a highly deferential standard. Contrary to petitioners' contention, Section 202(a)(1) of the CAA does not divest EPA of that customary discretion. To the contrary, that Section must be read in light of that well-established background of discretion. Section 202(a)(1) states that EPA must undertake rulemaking *if* the agency renders a judgment that a pollutant meets the statutory endangerment standard, but it does not impose any deadline by which EPA must make such a determination with respect to particular pollutants. EPA identified a variety of sound reasons—including the "[s]ubstantial scientific uncertainties" (Pet. App. A84) that surround this issue, while major federal studies are being conducted—for declining to determine at this time whether the

greenhouse gases at issue meet the endangerment standard. There is no basis on the present administrative record for this Court to overturn that considered agency judgment.

ARGUMENT

Global climate change is one of the most important and widely debated scientific, economic, and political issues of our time. While the science of global climate change is evolving and remains subject to substantial debate and uncertainties, the United States has established a multifaceted approach to studying and addressing that complex and important issue. As part of that effort, the United States has allocated more than 29 billion dollars during the years 2001-2006—more than any other nation—for scientific research into global climate change and for climate-related programs; has committed to significantly reducing the greenhouse gas intensity of the American economy over the next decade; has entered into extensive partnerships with private industries designed to reduce greenhouse gas emissions; has entered into multilateral and bilateral agreements with other nations to seek a cooperative international approach to addressing global climate change; and has become the largest funder of activities under the United Nations Framework Convention on Climate Change.[2] As ongoing scientific studies provide additional information about the problem and potential solutions, the United States stands ready to take further measures and to work with the rest of the world to address the phenomenon of climate change.

---

[2] See generally Pet. App. A88-A92; <http://www.epa.gov/climatechange/> (visited Oct. 24, 2006); <http://www.state.gov/g/oes/rls/fs/46741.htm> (visited Oct. 24, 2006); <http://www.whitehouse.gov/ceq/global-change.html> (visited Oct. 24, 2006); <http://www.whitehouse.gov/news/releases/2006/07/20060711-7.html> (visited Oct. 24, 2006).

This case, however, does not concern the adequacy of those broader efforts. Rather, the case presents more modest issues concerning the standing of petitioners to seek relief in federal court and the legality of EPA's decision not to initiate a rulemaking with respect to greenhouse gas emissions from new motor vehicles at this time. Under established principles of federal jurisdiction, statutory interpretation, and administrative law, petitioners' challenge to that agency decision fails, both because petitioners lack Article III standing and, alternatively, because EPA's denial of the rulemaking petition was lawful. Rejection of petitioners' challenge will in no way foreclose additional steps by the United States government to address global climate change or subsequent litigation concerning those efforts. Nor will it prevent Congress from acting to clarify its intent with respect to EPA's role in this area. It will simply block the efforts of these would-be litigants to enlist the courts to force EPA to undertake immediate regulation of greenhouse gas emissions from new motor vehicles.

I. PETITIONERS LACK ARTICLE III STANDING

All parties invoking the jurisdiction of the federal courts must "carry the burden of establishing their standing under Article III" of the Constitution. *DaimlerChrysler Corp.* v. *Cuno*, 126 S. Ct. 1854, 1860-1861 (2006). That bedrock requirement is designed to "ensur[e] that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society." *Id.* at 1860 (internal quotation marks omitted). When a plaintiff fails to demonstrate standing to bring an action, "the courts have no business deciding it, or expounding the law in the course of doing so." *Id.* at 1861. Those considerations are particularly apt in this case, where petitioners seek a judicial order directing EPA to regulate in a sphere of great economic and political significance.

To establish standing, a plaintiff must show not only "injury in fact," but also that there is "a causal connection between the injury and the conduct complained of," so that the plaintiff's injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). The plaintiff also must show that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43). In cases like this one, where a special jurisdictional provision authorizes direct review of federal agency action by a court of appeals, the petitioner may be required to submit declarations setting forth specific facts that establish all three elements of Article III standing.[3]

Judge Tatel concluded, in dissent, that petitioners' declarations established Article III standing at least with respect to the Commonwealth of Massachusetts. See Pet. App. A27-A31. In his view, petitioners adequately demonstrated injury in fact

---

[3] A petition for review in the District of Columbia Circuit is the exclusive avenue for seeking judicial review of EPA decisions like the one at issue here. See 42 U.S.C. 7607(b)(1). Under that Circuit's precedent, standing issues are typically decided on the basis of declarations supplied by the parties in the court of appeals. See generally *Sierra Club* v. *EPA*, 292 F.3d 895, 898-901 (D.C. Cir. 2002); Pet. App. A8-A9; see also D.C. Cir. R. 15(c)(2), 28(a)(7) (July 2006). The standard of review for such issues is akin to that applicable at the summary-judgment stage in a district court proceeding. See *Sierra Club*, 292 F.3d at 899. As this Court has explained, "each element of Article III standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation," and "a plaintiff must set forth by affidavit or other evidence specific facts to survive a motion for summary judgment." *Bennett* v. *Spear*, 520 U.S. 154, 167-168 (1997) (citations and internal quotation marks omitted).

through declarations predicting that greenhouse gas emissions will lead to global warming, which in turn will cause rising sea levels, which in turn will "lead both to permanent loss of coastal land and to more frequent and severe storm surge flooding events along the coast." *Id.* at A27 (internal quotation marks omitted).[4] But even assuming that the available science supports such cataclysmic predictions, that is not enough. In order to establish causation and redressability, petitioners must further demonstrate that their anticipated injury is to a material extent attributable to the specific agency action they complain of—*i.e.*, EPA's decision not to regulate greenhouse gas emissions *from new motor vehicles within the United States*—and that a judicial decision requiring EPA to undertake such regulation is likely to have the ultimate effect of significantly alleviating that harm. Petitioners have failed to make those showings.

---

[4] Petitioners also assert (Br. 6 n.5) standing on the ground that the EPA decision at issue here "threatens to have ripple effects on California's and other States' sovereign power to enforce State laws" because it may be invoked as a ground for holding state regulation of greenhouse gas emissions to be preempted. As petitioners' amici acknowledge (see Arizona Amici Br. 8 n.1), however, that argument was presented in the court of appeals only through a post-briefing letter submitted by California pursuant to Federal Rule of Appellate Procedure 28(j). Consistent with applicable circuit precedent, see *Sierra Club* v. *EPA*, 292 F.3d 895, 900-901 (D.C. Cir. 2002) (holding that a petitioner seeking direct court of appeals review of federal agency action must present all materials necessary to establish standing no later than in its opening brief), the court of appeals did not address that theory. Because that alternative standing theory was not presented in briefing to the court of appeals and that court did not pass upon it, the argument is not properly before this Court. See *Clingman* v. *Beaver*, 544 U.S. 581, 597-598 (2005). In any event, the States' concern, although it might provide a motivation for a State to file an amicus brief, is far too speculative to support a claim of standing.

A. Petitioners Have Failed To Demonstrate That The Regulation They Seek Is Likely To Affect Climatic Or Environmental Conditions In Massachusetts

Global climate change is, by definition, a global phenomenon. The greenhouse gases at issue here are "fairly consistent in concentration, everywhere along the surface of the earth." Pet. App. A73. The vast majority—as much as 80 percent—of all greenhouse gas emissions emanate from countries other than the United States. See J.A. 238. For that reason, reducing greenhouse gas emissions within the United States is unlikely, as a general matter, to have a significant long-term impact on climatic conditions in this country without reductions of greenhouse gas emissions in other parts of the world. Moreover, even within the United States, petitioners' own declaration indicates that nearly 70% of United States greenhouse gas emissions are from *non*-transportation sources and thus would not be affected by the rulemaking petitioners request. See *ibid.* One of petitioners' declarations states that, during the 1990s, "the U.S. transportation sector (mainly automobiles) was responsible for about 7% of global fossil fuel emissions." *Ibid.*

Even that 7% figure substantially overstates the potential impact of the regulation that petitioners advocate. Because EPA's regulatory authority under 42 U.S.C. 7521(a) is limited to *new* motor vehicles, only a very small fraction (significantly less than 7%) of worldwide greenhouse gas emissions could potentially be affected by the rulemaking that petitioners have asked EPA to initiate. And even with respect to new vehicles, petitioners recognize (Br. 19-20) that EPA could not mandate a total cessation of greenhouse gas emissions. The requested EPA rulemaking would therefore result in, at most, a tiny percentage reduction in worldwide greenhouse gas emissions. Nothing in the record suggests that so small a fraction of worldwide greenhouse gas emissions could materially affect the

overall extent of global climate change. Petitioners' declarations therefore do not establish that the regulatory action they seek, standing alone, would have any material impact on climatic or environmental conditions within Massachusetts.

B. Petitioners' Predictions Concerning The Possible Indirect Effects Of EPA Regulation Are Too Speculative To Establish Causation And Redressability

Petitioners do not appear to dispute the foregoing analysis. The declarations they submitted in the court of appeals contained no discussion of the direct effects on global climatic conditions (or conditions in Massachusetts) of reductions in greenhouse gas emissions from new motor vehicles in the United States. Rather, those declarations predict that the requested rulemaking would set in motion an elaborate chain of events, including (i) investment in improved technology; (ii) development of technological innovations by private industry; (iii) emissions regulation by foreign governments; (iv) meaningful global reductions in emissions of greenhouse gases; (v) a significant climatic response to such emissions reductions decades in the future; and (vi) consequent alleviation in Massachusetts of its alleged injury (*e.g.*, coastal land loss).

For example, the declaration of Michael P. Walsh forecasts that "establishing emissions standards for pollutants that contribute to global warming would lead to investment in developing improved technologies to reduce those emissions from motor vehicles, and that successful technologies would gradually be mandated by other countries around the world." J.A. 244. The declaration of Michael C. McCracken similarly predicts that, "[i]f the U.S. takes steps to reduce motor vehicle emissions, other countries are very likely to take similar actions regarding their own motor vehicles using technology developed in response to the U.S. program, thereby multiplying the total emission reduction benefit of the U.S. action." J.A. 239. Peti-

tioners' theory of causation and redressability thus depends on projections that (a) EPA regulation of greenhouse gas emissions from new motor vehicles within the United States will spur technological advances by private industry, and (b) foreign governments, including foreign governments in developing countries that face added economic dilemmas, will mandate use of the resulting technology, thereby reducing greenhouse gas emissions worldwide.[5]

Given the highly speculative nature of those projections, petitioners cannot establish causation and redressability under ordinary standing principles. Because of the nature of their challenge, however, petitioners face a heightened burden in establishing the requisite causation and redressability. In *Defenders of Wildlife*, the Court explained that, in a suit "challenging the legality of government action or inaction," the showing needed to establish standing

> depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or

---

[5] In its "Summary of Opinions" section, the McCracken Declaration states that "[a]chievable reductions in emissions of [carbon dioxide] and other greenhouse gases from U.S. motor vehicles would significantly reduce the build-up in atmospheric concentrations of these gases and delay and moderate many of the adverse impacts of global warming." J.A. 225-226. In light of the more detailed analysis set forth in subsequent paragraphs of the declaration, however, that statement is not naturally read as an assertion that emissions reductions from new United States motor vehicles, *in and of themselves*, would materially ameliorate global climate change. Rather, the declaration as a whole sets forth the view that such reductions would ultimately lead to the desired effects by spurring technological innovation and by inducing foreign governments to impose comparable limits. If the quoted sentence *was* intended as an assertion that EPA motor vehicle regulation by itself would materially impact worldwide climatic conditions, it is unsupported by specific facts and is far too conclusory and farfetched to establish causation and redressability.

> requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict, * * * and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.

504 U.S. at 561-562 (citations and internal quotation marks omitted); see *Simon*, 426 U.S. at 45.

Petitioners, of course, do not challenge EPA's regulation of their own conduct. They contend instead that EPA's refusal to regulate the manufacturers of new motor vehicles will cause petitioners injury, and that EPA's exercise of regulatory authority would alleviate that harm. Under *Defenders of Wildlife*, the elaborate chain of events that petitioners claim will ultimately ameliorate the effects of climate change in Massachusetts falls far short of the "much more" (504 U.S. at 562) that is needed to establish causation and redressability.

Depending on the stringency of the limits that the agency imposed, EPA regulation of greenhouse gas emissions from new motor vehicles in the United States might ultimately lead to technological improvements developed to facilitate compliance with the new requirements. The nature of any such inno-

vations, however, is at this point a matter of pure conjecture.[6] Petitioners' forecasts concerning foreign governments' likely responses to EPA regulation are even more speculative. Foreign sovereigns are paradigmatic "independent actors * * * whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Defenders of Wildlife*, 504 U.S. at 562 (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). As experience demonstrates, foreign governments may respond "in different ways" to global climate change, "depending on their perceptions of wise state [environmental] policy and myriad other circumstances." *ASARCO*, 490 U.S. at 615 (opinion of Kennedy, J.).

At least absent a treaty or similar binding arrangement whereby a foreign government has *committed* to respond in specific ways to particular United States actions, it is neither

---

[6] A plaintiff cannot establish causation and redressability simply by showing that particular government action would create a financial inducement to the private conduct that the plaintiff desires. In *Simon*, the Court held that indigent plaintiffs lacked standing to challenge the decision of the Internal Revenue Service (IRS) to grant tax-exempt status to hospitals that refused to serve indigents. See 426 U.S. at 32-33, 40-46. The Court found it "purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. In *Allen* v. *Wright*, 468 U.S. 737 (1984), the Court reached a similar conclusion, holding that plaintiffs who alleged an impairment of their ability to have their children educated in a racially integrated setting lacked standing to challenge the IRS's grant of tax exemptions for certain racially discriminatory private schools. See *id.* at 756-761. The Court explained, *inter alia*, that it was "entirely speculative * * * whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* at 758. Furthermore, with or without greenhouse gas regulation, automobile manufacturers have significant legal and economic incentives to improve fuel efficiency. Those incentives make it particularly difficult for petitioners to show that regulation under the CAA would be the cause of significant technological innovations.

feasible nor appropriate for a federal court to predict the likely response of a foreign sovereign to EPA regulation in the domestic sphere. Reliance on petitioners' forecasts as a basis for federal jurisdiction would be especially inappropriate here. Those predictions are not based on analysis of the unique aspects of the issue of global climate change or of the likely future behavior of foreign governments in this distinct context. Moreover, those forecasts are directly contrary to EPA's expressed concern that "[u]nilateral EPA regulation of motor vehicle [greenhouse gas] emissions could * * * *weaken* U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies," Pet. App. A86 (emphasis added), and they are inconsistent with the United States' experience in addressing stratospheric ozone depletion, see *id.* at A86 n.5.[7]

C. Petitioners' Accounts Of Previous Regulatory Undertakings Are Insufficient To Establish Standing

The Walsh Declaration asserted that, because motor vehicle emissions standards previously imposed in the United States have led to technological improvements and to parallel emissions limits imposed by foreign governments, EPA regulation of greenhouse gas emissions would likely have the same result. See J.A. 242-243. Petitioners' description of prior regulatory

---

[7] Stratospheric ozone depletion formerly presented a global phenomenon similar to global climate change. The United States' experience in addressing that problem during the 1980s reinforces the concern that, when the harms caused by emissions in one country are spread throughout the world, unilateral regulatory action by the United States is unlikely to induce foreign governments to undertake comparable measures. As EPA explained, unilateral "U.S. controls on substances that deplete stratospheric ozone were * * * more than offset by emission increases in other countries. The U.S. did not impose additional domestic controls on stratospheric ozone-depleting substances until key developed and developing nations had committed to controlling their own emissions." Pet. App. A86 n.5.

episodes is a wholly inadequate basis for concluding that Article III's requirements have been satisfied here. The plaintiffs in *Simon* and *Allen* (see note 6, *supra*) surely could not have established causation and redressability simply by identifying prior instances in which economic actors had altered their behavior in response to changes in the tax laws.

Petitioners' reliance on prior emissions regulation by foreign governments is particularly misconceived. The fact that greenhouse gases are evenly concentrated throughout the world creates a distinct obstacle to unilateral emissions regulation by any single government, since the country that imposes such limits may bear a substantial economic burden but will receive only a small share of any resulting benefit. The prior willingness of foreign sovereigns to follow the United States' lead by mandating reductions in *other* types of emissions—which lead to greater localized environmental hazards, such as smog—therefore does not suggest that unilateral EPA regulation of greenhouse gas emissions by new motor vehicles in the United States would be likely to have the same result. Indeed, the global nature of the phenomenon at issue provides a classic situation in which countries—particularly developing countries—may seek a "free ride" from expensive regulation self-imposed by other nations. See note 7, *supra*.

Because petitioners lack Article III standing to maintain this action, this case should be remanded to the court of appeals with instructions to dismiss the petition for review for lack of jurisdiction, and this Court should refrain from "expounding" (*Cuno*, 126 S. Ct. at 1861) on the case. Indeed, the restraint imposed by Article III's standing requirement is particularly appropriate in cases such as this, given the economic and political sensitivity of the regulation that petitioners seek to force

EPA to undertake, and the significant scientific uncertainty concerning global climate change.[8]

II. EPA REASONABLY CONCLUDED THAT THE CAA DOES NOT AUTHORIZE IT TO REGULATE EMISSIONS OF GREENHOUSE GASES TO ADDRESS CONCERNS ABOUT GLOBAL CLIMATE CHANGE

On the merits, petitioners argue (*e.g.*, Br. 12) that, because carbon dioxide and other greenhouse gases emitted from motor vehicles are "substance[s] or matter which [are] emitted into or otherwise enter[] the ambient air," 42 U.S.C. 7602(g), those gases are encompassed by the CAA's definition of "air pollutant" and are therefore subject to EPA regulation. Petitioners do not contend, however, that Congress specifically contemplated the application of the CAA to regulatory control of greenhouse gas emissions to address global climate change, either when Congress enacted the definition of "air pollutant," see *ibid.*, or when it authorized EPA to regulate emissions from new motor vehicles, see 42 U.S.C. 7521(a). Nor do they account for more recent statutes that specifically address carbon dioxide emissions and global climate change, and indicate that EPA lacks authority to regulate such matters under the general provisions on which petitioners rely.

---

[8] Judge Randolph concluded that petitioners' declarations were sufficient to create genuine issues of fact as to each of the three elements of standing, see Pet. App. A7-A8, and proceeded to the merits of petitioners' claims, see *id.* at A9. For the reasons stated above, however, as a matter of law, petitioners have failed to "set forth * * * specific facts," *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted), that, if believed, would establish causation and redressability. Because petitioners have failed to present evidence sufficient to carry their burden at this stage of the litigation (see note 3, *supra*), the court of appeals lacked authority to reach the merits of petitioners' claims, and the petitions for review should have been dismissed for want of jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998).

Standing alone, the enacting Congress's failure specifically to contemplate the CAA's application to greenhouse gases does not mean that such applications are automatically precluded. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998). EPA responsibly recognized, however, that this Court's recent decision in *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), "cautions agencies against using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues when Congress has specifically addressed those areas in other statutes." Pet. App. A68. That principle counsels against interpreting the CAA to encompass the inchoate authority to regulate the type of emissions at issue here. Indeed, as EPA observed, "[i]t is hard to imagine any issue in the environmental area having greater 'economic and political significance' than regulation of activities that might lead to global climate change." *Id.* at A76.

In *Brown & Williamson*, this Court held that the Food and Drug Administration (FDA) lacked authority under the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, to regulate tobacco products. See 529 U.S. at 133-161. The Court assumed, arguendo, that cigarettes and smokeless tobacco are encompassed by the FDCA's definition of "drug delivery device[]." *Id.* at 131-132. The Court recognized, however, that reading the FDCA to cover tobacco products was inconsistent with Congress's actions concerning tobacco in more recent statutes, see *id.* at 143, and it noted that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand," *id.* at 133. The Court further explained that it "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Ibid.*; see *Whit-*

man v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citing, *inter alia*, *Brown & Williamson* in explaining that Congress "does not, one might say, hide elephants in mouseholes").

Based on analogous considerations, EPA reasonably determined that it lacks authority to address the threat of global climate change by regulating greenhouse gas emissions from new motor vehicles. EPA explained that key provisions of the CAA cannot cogently be applied to such emissions, and that a broad range of legislation evidences Congress's intent to obtain additional information before regulating in this controversial sphere. Pet. App. A70-A74, A79-A80. EPA also observed that regulation of greenhouse gas emissions would potentially have even greater economic and political implications than tobacco regulation. *Id.* at A76. EPA concluded that the relevant provisions of law, taken as a whole, were best construed not to authorize regulation under the CAA of greenhouse gas emissions for the purpose of addressing global climate change. That self-restrained determination is reasonable and is entitled to deference under the principles of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Petitioners make the extravagant claim that "EPA's interpretation deserves no deference." Pet. Br. 9. But where, as here, Congress has not directly spoken to an issue, neither *Chevron* nor any other precedent of this Court precludes an agency from exercising prudence or self-restraint in determining whether, or how, to regulate a problem of such enormous economic and political magnitude as global climate change. Acceptance of petitioners' position would suggest that agencies are subject to a presumptive duty to regulate whenever a statute arguably authorizes regulation, even with respect to issues as to which awaiting direct congressional

guidance or the results of ongoing studies would be most responsible and beneficial.[9]

A. Key Provisions Of The CAA Cannot Coherently Be Applied To Greenhouse Gas Emissions

1. In determining whether the CAA authorizes regulation of greenhouse gases to address the threat of global climate change, EPA appropriately considered whether a principal CAA mechanism for controlling pervasive air pollutants—the NAAQS system, see 42 U.S.C. 7408-7410—could feasibly be used to address carbon dioxide emissions. See Pet. App. A72-A74. As EPA explained, the NAAQS regime has traditionally been directed at controlling pollutants at or near the surface of the earth. *Id.* at A72. "Concentrations of these substances generally vary from place to place as a result of differences in local or regional emissions and other factors (e.g., topography)." *Ibid.* Congress expected that there would be material differences among the States in their efforts to meet the NAAQS, and it therefore directed EPA to designate "attainment" and "nonattainment" areas for particular pollutants, with more stringent requirements generally applying to nonattainment areas. See 42 U.S.C. 7407(d), 7501-7515.

---

[9] As petitioners observe (Br. 3), two prior EPA general counsels had expressed the view that the agency was authorized to regulate greenhouse gas emissions under the CAA. See note 1, *supra*. In denying ICTA's petition for rulemaking, however, EPA acknowledged those earlier statements, see Pet. App. A68, expressly adopted the contrary position, *id.* at A69, and explained in detail the bases for that decision, see *id.* at A68-A80. Under those circumstances, EPA's current interpretation of the relevant CAA provisions is entitled to judicial deference. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699-2700 (2005). Moreover, even when EPA general counsels believed that the agency possessed the *authority* to regulate greenhouse gas emissions, EPA nevertheless declined to *exercise* that authority. There is consequently an unbroken agency practice of declining to regulate in this sphere. See pp. 44-45, *infra*.

By contrast, carbon dioxide—the most pervasive anthropogenic greenhouse gas—is well-mixed globally throughout the atmosphere and persists there for roughly 50 to 200 years. Pet. App. A73. With respect to carbon dioxide emissions, EPA would therefore have no practical basis for distinguishing between attainment and nonattainment areas. And if EPA established a NAAQS for carbon dioxide that called for a reduction from present concentrations, the entire Nation would be subject to the stringent CAA limitations that apply to nonattainment areas, even though the success of state efforts to achieve the applicable standard would depend on the willingness of foreign governments to undertake parallel measures to reduce worldwide carbon dioxide emissions. *Ibid.*; see pp. 14-18, *supra*. "Such a situation would be inconsistent with a basic underlying premise of the CAA regime for implementation of a NAAQS—that actions taken by individual states and by EPA can generally bring all areas of the U.S. into attainment of a NAAQS." *Ibid.*

2. The petition for rulemaking in this case did not request that EPA promulgate NAAQS for greenhouse gases, but instead sought regulation of greenhouse gas emissions from new motor vehicles. See J.A. 43. At present, however, the only practical way of meaningfully reducing motor-vehicle emissions of the greenhouse gases at issue here is by improving fuel economy. See Pet. App. A79, A87; see also 71 Fed. Reg. 17,654 (2006). Because the emissions limits that petitioners advocate would function in practical effect as fuel-economy regulations, EPA's adoption of such limits would subvert the implementation by the Department of Transportation (DOT) of the Energy Policy and Conservation Act (EPCA), 49 U.S.C. 32901-32919. See Pet. App. A77, A79-A80.

In EPCA, "Congress has already created a detailed set of mandatory standards governing the fuel economy of cars and light duty trucks, and has authorized DOT—not EPA—to

implement those standards." Pet. App. A79. EPCA offers automakers substantial flexibility to choose appropriate methods of meeting fleetwide standards, and it provides for congressional oversight of standards promulgated by DOT pursuant to the statute. See *id.* at A79-A80. The tension between the EPCA and CAA regimes would be particularly acute for "non-passenger" vehicles (which include light trucks and SUVs), for which EPCA requires DOT to set fuel-economy standards at the "maximum feasible" level. 49 U.S.C. 32902(a); see, *e.g.*, 71 Fed. Reg. 17,588 (2006). An EPA-imposed emissions limit that effectively required manufacturers to satisfy fuel-economy standards *above* the level determined by DOT to be the "maximum feasible" would directly clash with DOT's administration of EPCA. Based on the considerable evidence that Congress intended EPCA to be exclusive, EPA reasonably concluded that, "[e]ven if [greenhouse gases] were air pollutants generally subject to regulation under the CAA, Congress has not authorized the Agency to regulate [carbon dioxide] emissions from motor vehicles to the extent such standards would effectively regulate the fuel economy of passenger cars and light duty trucks." Pet. App. A79.

Accordingly, greenhouse gas emissions "simply do not fit," *Brown & Williamson*, 529 U.S. at 143, within key aspects of the regulatory regime established by the CAA. The physical characteristics of carbon dioxide preclude cogent application of the NAAQS. And any attempt by EPA to mandate reductions of greenhouse gas emissions from new motor vehicles would subvert Congress's determination that the EPCA fuel-economy standards should be exclusive.

B. Various Federal Statutes Reflect Congress's Intent To Obtain Additional Information Before Undertaking Any Regulation Of Greenhouse Gas Emissions

The Court in *Brown & Williamson* observed that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." 529 U.S. at 133. A variety of statutory provisions, both within the CAA and in other legislation, have addressed the subjects of carbon dioxide emissions and global climate change, as well as the analogous issue of stratospheric ozone depletion. Most of those provisions were enacted far more recently, and are therefore more probative of the *current* meaning of the statutory scheme, than the general CAA provisions on which petitioners rely. Taken together, those intervening enactments strongly indicate that EPA lacks authority under the CAA in its current form to regulate greenhouse gas emissions in order to address global climate change. See Pet. App. A69-A72.

1. Three provisions added to the CAA in 1990 specifically refer to carbon dioxide or global warming. Section 103(g)(1) of the Act refers to carbon dioxide in calling for the development of pollution prevention "strategies and technologies." See 42 U.S.C. 7403(g)(1). Section 602(e) of the Act, 42 U.S.C. 7671a(e), directs EPA to determine and publish the "global warming potential" of each of several listed substances. And Section 821 of the CAA Amendments of 1990, see Pub. L. No. 101-549, 104 Stat. 2699 (42 U.S.C. 7651k note), directs EPA to obtain and make available information concerning carbon dioxide emissions by certain regulated utilities.

In enacting those provisions, however, Congress expressly declined to authorize EPA to impose emissions limits. In five separate places, Section 103(g) of the CAA states that the "strategies and technologies" developed by EPA are to be

"nonregulatory." See 42 U.S.C. 7403(g), 7403(g)(1)-(4). Section 103(g) further provides that "[n]othing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements." 42 U.S.C. 7403(g). Section 602(e) similarly states that the requirement to identify the global warming potential of various substances "shall not be construed to be the basis of any additional regulation under this chapter." 42 U.S.C. 7671a(e). And Section 821 of the CAA Amendments of 1990, like Section 602(e) of the CAA, is directed solely at information-gathering.

Since these are the only CAA provisions that specifically address either carbon dioxide emissions or global warming, and since they provide only for information collection or other nonregulatory action, they strongly suggest a congressional understanding that EPA lacks authority under the Act to regulate greenhouse gas emissions for the purpose of addressing global climate change. At a minimum, those provisions reflect a con ressional preference that any general authority EPA might possess in this area *not* be exercised in a regulatory manner. Congress's current preference for nonregulatory measures is wholly understandable and prudent in light of the significant complexity and uncertainty surrounding this issue and the enormous potential economic and political consequences of regulating in this area.

2. Congress has enacted several statutory provisions outside the CAA that mandate research and inter-agency coordination to inform future legislative efforts and negotiations with foreign governments to address the subject of global climate change. See Pet. App. A74-A75.[10] As EPA explained,

---

[10] The National Climate Program Act, 15 U.S.C. 2901 *et seq.*, called for, *inter alia*, "basic and applied research to improve the understanding of climate processes, natural and man induced, and the social, economic, and political implications of climate change." 15 U.S.C. 2904(d)(2). The Global Climate Protection Act of 1987, Pub. L. No. 100-204, §§ 1101-1106, 101 Stat. 1407-1409

> [w]ith these statutes, Congress sought to develop a foundation for considering whether future legislative action on global climate change was warranted and, if so, what that action should be. From federal agencies, it sought recommendations for national policy and further advances in scientific understanding and possible technological responses. It did not authorize any federal agency to take any regulatory action in response to those recommendations and advances.

Id. at A74. EPA reasonably viewed that pattern of "consistent congressional action to learn more about the global cli-

---

(15 U.S.C. 2901 note), directed EPA to "develop[] and propos[e] to Congress a coordinated national policy on global climate change," § 1103(b), 101 Stat. 1408, and directed EPA and the Department of State to "jointly" report to Congress on their strategy for achieving "international cooperation to limit global climate change," § 1104(3), 101 Stat. 1409. The Global Change Research Act of 1990, Pub. L. No. 101-606, Tit. I, 104 Stat. 3096 (15 U.S.C. 2921-2938), contained a congressional finding that "human-induced changes, in conjunction with natural fluctuations, may lead to significant global warming and thus alter world climate patterns and increase global sea levels." 15 U.S.C. 2931(a)(2). The Act established various mechanisms, including the creation of a Committee on Earth and Environmental Sciences (see 15 U.S.C. 2932), to "provide for development and coordination of a comprehensive and integrated United States research program which will assist the Nation and the world to understand, assess, predict, and respond to human-induced and natural processes of global change." 15 U.S.C. 2931(b). The Global Climate Change Prevention Act of 1990, Pub. L. No. 101-624, §§ 2401-2412, 104 Stat. 4058-4062 (7 U.S.C. 6701 *et seq.*), directed the Department of Agriculture to "study the effects of global climate change on agriculture and forestry." § 2403(a)(1), 104 Stat. 4059 (7 U.S.C. 6702(a)(1)). The Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 1601-1609, 106 Stat. 2999-3008 (42 U.S.C. 13381-13388), directed the Secretary of Energy to compile, analyze, and report various categories of information pertaining to global climate change. See, *e.g.*, § 1604, 106 Stat. 3002 (42 U.S.C. 13384) (directing the Secretary to "transmit a report to Congress containing a comparative assessment of alternative policy mechanisms for reducing the generation of greenhouse gases").

mate change issue before specifically authorizing regulation to address it" as strong evidence that the CAA did not *already* authorize regulatory activity in this area. *Id.* at A75.[11]

3. The method by which Congress addressed the phenomenon of stratospheric ozone depletion is also illuminating. See Pet. App. A71-A72. "Like global climate change, the causes and effects of stratospheric ozone depletion are global in nature. Anthropogenic substances that deplete stratospheric ozone are emitted around the world and are very long-lived; their depleting effects and the consequences of those effects occur on a global scale." *Ibid.*; see generally 53 Fed. Reg. 30,566 (1988); 57 Fed. Reg. 33,754 (1992). As EPA explained, "Congress specifically addressed the problem in a separate portion of the [CAA] * * * that recognized the global nature of the problem and called for negotiation of international agreements to ensure world-wide participation in research and any control of stratospheric ozone-depleting substances." Pet. App. A72.[12]

---

[11] EPA further observed that "Congress declined to adopt other legislative proposals, contemporaneous with the bills to amend the CAA in 1989 and 1990, to require [greenhouse gas] emissions reductions from stationary and mobile sources." Pet. App. A74-A75. Subsequent to the 1990 amendments to the CAA, a number of additional bills that would have mandated EPA regulation of greenhouse gas emissions have been introduced but not enacted. See Gov't C.A. Br. 52-53 & n.22. Of course, Congress may direct EPA to undertake regulation of greenhouse gases at any time that it sees fit. Absent such explicit congressional action, however, it would be anomalous for the courts to direct EPA to take that significant regulatory step, especially against the backdrop of the actions that Congress *has* taken in this realm.

[12] In 1977 Congress amended the CAA to add a new Part B, entitled "Ozone Protection," to Title I of the Act. See 42 U.S.C. 7450-7459 (1988). Those provisions were principally focused on developing the information needed to confirm the theory, understand the effects, and develop methods for control. See, *e.g.*, 42 U.S.C. 7450, 7453, 7454 (1988). Congress also directed the President to undertake to enter into international agreements for cooperative research and regulations, and it provided EPA with specific regulatory

Thus, in addressing the global problem of stratospheric ozone depletion, Congress avoided the possibility of piecemeal regulation by enacting new legislation that was specifically directed at the issue and called for international cooperation. That legislative approach provides persuasive evidence of Congress's intent with respect to the analogous issue of global climate change. As EPA explained, "[i]n light of this CAA treatment of stratospheric ozone depletion, it would be anomalous to conclude that Congress intended EPA to address global climate change under the CAA's general regulatory provisions, with no provision recognizing the international dimension of the issue and any solution, and no express authorization to regulate." Pet. App. A72.

4. The history of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, *opened for signature*, Mar. 16, 1998, 37 I.L.M. 32, reinforces EPA's conclusion that Congress did not intend the agency to regulate greenhouse gas emissions under the CAA. The Protocol was agreed to in 1997 and generally called for industrialized countries to cut their combined emissions to five percent below 1990 levels by 2008 to 2012. See U.N. Framework Convention on Climate Change, *Kyoto Protocol* (visited Oct. 24, 2006) <http://unfccc.int/essential_background/

---

authority to avoid reasonably anticipated harm to the stratosphere. 42 U.S.C. 7456, 7457 (1988). In 1989, after the discovery of a seasonal hole in the stratospheric ozone layer over Antarctica in 1985, 29 nations (including the United States) ratified the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29 (Montreal Protocol), which set limits on the production and consumption of various substances that contribute to ozone depletion. See generally S. Rep. No. 228, 101st Cong., 1st Sess. 383 (1989). In 1990, Congress enacted additional CAA amendments that repealed Part B of Title I and replaced it with a new Title VI establishing a more comprehensive regulatory program, consistent with the Montreal Protocol, to control substances that deplete stratospheric ozone and their substitutes. See 42 U.S.C. 7671-7671q.

kyoto_protocol/items/2830.php> (*Kyoto* Website). Although it was initially signed by the United States, the United States subsequently made clear that it does not intend to become a party, and the Protocol was never submitted to the Senate for advice and consent to ratification. See Pet. App. A75. Indeed, "the Senate in 1997 adopted by a 97-0 vote the Byrd-Hagel Resolution," which expressed the Senate's opposition to any international agreement "that would result in serious harm to the economy of the U.S. or that would mandate new commitments to limit or reduce U.S. [greenhouse gas] emissions" unless the agreement imposed parallel limitations on developing countries. *Ibid.* "Congress also attached language to appropriations bills that barred EPA from implementing the Kyoto Protocol without Senate ratification." *Ibid.* Those legislative actions reflect the opposition of both Houses of Congress to any unilateral action by EPA to regulate greenhouse gas emissions within the United States.[13]

C. Regulation Of Greenhouse Gas Emissions Within The United States Would Have Potentially Vast Economic And Political Consequences

The Court in *Brown & Williamson* also recognized that, if Congress intends to authorize an administrative agency to resolve an issue of great economic and political significance, "common sense" suggests that Congress will express that intent with reasonable specificity. See 529 U.S. at 133, 160.

---

[13] Although the Kyoto Protocol was agreed to in 1997, it did not come into effect among its foreign signatories until February 2005 (well after the EPA decision at issue here), see *Kyoto* Website, and its efficacy remains the subject of intense political and scientific debate. See, *e.g.*, <http://www.state.gov/secretary/rm/2006/73913.htm> (Secretary of State Condoleeza Rice states that "the Kyoto targets are not being met" and that, "[e]ven if they were met, without China and India covered by Kyoto you're not going to deal with greenhouse gas emissions in an effective way.").

That concern applies with particular force in the instant case. As EPA explained,

> [i]t is hard to imagine any issue in the environmental area having greater "economic and political" significance than regulation of activities that might lead to global climate change. Virtually every sector of the U.S. economy is either directly or indirectly a source of [greenhouse gas] emissions, and the countries of the world are involved in scientific, technical, and political-level discussions about climate change.

Pet. App. A76; see *id.* at A76-A77 (explaining that anthropogenic carbon dioxide emissions are the direct result of the production of energy from fossil fuels—the power source for nearly all modes of transportation and approximately 70 percent of the electricity in this country).

Although the petition for rulemaking in this case sought the imposition of greenhouse gas emissions limits only with respect to new motor vehicles, the thrust of petitioners' argument is that greenhouse gases are literally encompassed by the CAA definition of "air pollutant" and must therefore be so regarded for purposes of *all* the Act's provisions. See, *e.g.*, Pet. Br. 12, 17. Moreover, given the global character of the problem to be addressed and the pervasive use of fossil fuels throughout the United States economy, Congress cannot reasonably be thought to have intended that EPA would regulate greenhouse gas emissions from new motor vehicles but from no other source—particularly when the establishment of fuel-economy requirements for motor vehicles is entrusted to a different federal agency (see pp. 24-25, *supra*). In assessing Congress's intent in light of the economic and political significance of the decision it was called upon to make, EPA therefore appropriately considered the practical ramifications of regulating greenhouse gas emissions generally.

D. EPA's Interpretation Of The CAA's Text Is Reasonable

Based on the considerations described above, EPA determined that "the CAA does not authorize regulation to address concerns about global climate change." Pet. App. A78. Examining the text of the statutory provisions upon which petitioners relied, EPA further determined that "[greenhouse gases], as such, are not air pollutants under the CAA's regulatory provisions, including sections 108, 109, 111, 112 and 202," and that "the term 'air pollution' as used in the regulatory provisions cannot be interpreted to encompass global climate change." *Ibid.* EPA explained (*ibid.*) that the term "air pollutant" is defined in Section 302(g) of the CAA to mean "any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air," 42 U.S.C. 7602(g), and that greenhouse gases are not "agents" of air pollution for regulatory purposes because they do not cause cognizable "pollution" within the scope of the Act's regulatory provisions. Pet. App. A78.

Petitioners suggest (Br. 11) that EPA's construction of the CAA is suspect because the agency discussed other indicia of congressional intent before parsing the language of Sections 202 and 302(g). That is incorrect. EPA's conclusion as to the limits of its regulatory authority was firmly rooted in the text of *enacted laws*, including laws that specifically address global climate change and the analogous problem of stratospheric ozone depletion. The agency's approach was thus consistent with the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Petitioners are wrong in suggesting (Br. 23) that EPA should have disregarded the other statutory indicia

of congressional intent on the ground that those laws were enacted after Sections 202 and 302(g) of the CAA. As the Court observed in *Brown & Williamson*, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." 529 U.S. at 133. In light of the Court's teaching in *Brown & Williamson*, it was hardly ultra vires for EPA to consider such potentially relevant laws in construing the CAA's earlier-enacted regulatory provisions.

Petitioners are also wrong in contending (Br. 12) that EPA's interpretation "ignore[s] * * * the plain text" of Section 302(g). In petitioner's view, the statutory phrase "any air pollution agent or combination of such agents" is essentially superfluous, because anything that could be viewed as falling with the subsequent "including" phrase, standing alone, necessarily qualifies as an "air pollutant." But EPA reasonably rejected that view, in favor of an interpretation that gives "air pollution agent" independent meaning. Pet. App. A79 n.3. There is no textual difficulty in that approach, under which the "including" phrase merely illustrates the kinds of substances that can qualify as "air pollution agents" without also mandating inclusion of substances that do *not*, in the agency's expert view, contribute to "air pollution." The phrase "any American automobile, including any truck or minivan," would not naturally be construed to encompass a foreign-manufactured minivan, and the same principle governs here.

Petitioners further contend (Br. 16-17) that, because carbon dioxide is specifically identified as an "air pollutant" for purposes of Section 103(g)(1) of the CAA (42 U.S.C. 7403(g)(1)), it is necessarily an "air pollutant" for purposes of Section 202(a)(1) as well. That inference is unwarranted. "Although [the Court] generally presume[s] that identical words used in different parts of the same act are intended to have the same meaning, * * * the presumption is not rigid,

and the meaning of the same words well may vary to meet the purposes of the law." *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (citations, brackets, and internal quotation marks omitted). Section 103(g) of the CAA uses the word "nonregulatory" five times, and it states that "[n]othing in this subsection shall be construed to authorize the imposition on any person of air pollution control requirements." 42 U.S.C. 7403(g). Treating carbon dioxide as an "air pollutant" under Section 103(g)(1) and other nonregulatory provisions but not under Section 202(a)(1) is consistent with Congress's overall strategy of assimilating information about global climate change and possible responses thereto as a predicate for future action.

III. EPA REASONABLY EXERCISED ITS DISCRETION IN DETERMINING THAT, EVEN IF IT POSSESSED STATUTORY AUTHORITY IN THIS SPHERE, IT WOULD DECLINE TO EXERCISE THAT AUTHORITY AT THE PRESENT TIME

Even assuming that EPA possesses the statutory authority to regulate greenhouse gas emissions from new motor vehicles to address global climate change, the agency reasonably exercised its discretion in declining to do so at this time. EPA identified a variety of sound and appropriate reasons—including the complex and highly uncertain nature of the scientific record, the agency's desire to have the benefit of ongoing research, and the inadvisability of piecemeal regulation to address an issue of global magnitude at a time when the President and Congress are seeking to develop a comprehensive approach—in support of that conclusion. See Pet. App. A80-A92. Petitioners acknowledge (Br. 10, 41) that the "scientific uncertainty" surrounding global climate change is relevant to EPA's decision whether to regulate in this sphere. Petitioners nevertheless contend (Br. 35-48) that, if EPA is

authorized to regulate greenhouse gas emissions from new motor vehicles, Section 202(a)(1) of the CAA requires that the decision whether to exercise that authority must be based solely on scientific evidence concerning the likelihood of endangerment to the public health or welfare, and that EPA's consideration of additional factors was unlawful. For several reasons, that argument lacks merit.

A. Federal Agencies Have Broad Discretion To Decline To Initiate Rulemakings, Even When The Governing Law Would Authorize Regulation

Under established principles of administrative law, an Executive Branch agency generally "has considerable discretion in responding to requests to institute proceedings or to promulgate rules, *even though it possesses the authority to do so should it see fit.* Administrative rule making does not ordinarily comprehend any rights in private parties to compel an agency to institute such proceedings or promulgate rules." *Action for Children's Television* v. *FCC*, 564 F.2d 458, 479 (D.C. Cir. 1977) (emphasis added; internal quotation marks omitted). As the District of Columbia Circuit has explained:

> An agency's discretionary decision not to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution—*e.g.*, internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework. * * * Further, even if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived. * * * The area may be one of such rapid technological development that regulations would be outdated by the time they could become effective, or the scientific state of the art may be such that

> sufficient data are not yet available on which to premise adequate regulations.

NRDC v. *SEC*, 606 F.2d 1031, 1046 (D.C. Cir. 1979) (citations omitted). Those considerations are directly applicable here.

Precisely because a federal agency's decision not to commence a rulemaking may be based on discretionary considerations unrelated to the agency's legal authority to act, the District of Columbia Circuit has long recognized that a particularly deferential standard applies on judicial review of such a decision.[14] That court has described its role in reviewing denials of rulemaking petitions as "limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record." *National Ass'n of Regulatory Util. Comm'rs* v. *DOE*, 851 F.2d 1424, 1430 (D.C. Cir. 1988) (citation omitted). Thus, "[i]t is only in the rarest and most compelling of circumstances that th[e] court has acted to overturn an agency judgment not to institute rulemaking." *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981).

This Court's decision in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), reinforces the appropriateness of a deferential standard in this sphere. *Chaney* held that an agency's refusal to commence an enforcement proceeding is not ordinarily sub-

---

[14] See, *e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.* v. *FERC*, 388 F.3d 903, 910-911 (D.C. Cir. 2004) ("[W]e will overturn an agency's decision not to initiate a rulemaking only for compelling cause.") (citation omitted); *National Mining Ass'n* v. *United States Dep't of the Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995) ("[A]n agency's refusal to initiate a rulemaking is evaluated with deference so broad as to make the process akin to nonreviewability.") (citation omitted); *Timpinaro* v. *SEC*, 2 F.3d 453, 461 (D.C. Cir. 1993) (stating that such challenges will be upheld "only in the rarest and most compelling of circumstances") (citations omitted); *General Motors Corp.* v. *National Highway Traffic Safety Admin.*, 898 F.2d 165, 169 (D.C. Cir. 1990) (judicial review is "especially narrow" in such circumstances).

ject to judicial review *at all*. See *id.* at 828-835. The Court observed that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including the agency's assessments concerning the manner in which its limited resources can most effectively be allocated. *Id.* at 831. The Court also noted that, "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Those observations are equally applicable to an agency's decision not to commence a rulemaking. See *American Horse Protection Ass'n* v. *Lyng*, 812 F.2d 1, 3-4 (D.C. Cir. 1987).[15]

This Court's decision in *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), reinforces the conclusion that an agency's refusal to initiate rulemaking must be reviewed under a particularly deferential standard. The Court in *Motor Vehicle Manufacturers* specifically rejected the contention that "the rescission of an agency rule should be judged by the same standard a court would use to judge an agency's refusal to promulgate a rule in the first place." *Id.* at 41. The Court explained that "the revocation of an extant regulation is substantially different than a failure to act" because "[r]evocation

---

[15] The Court in *Chaney* noted that the case did "not involve the question of agency discretion not to invoke rulemaking proceedings," 470 U.S. at 825 n.2, and the Court accordingly did not address that question. In *American Horse Protection Ass'n*, the District of Columbia Circuit determined that "*Chaney* * * * does not appear to overrule [the court of appeals'] prior decisions allowing review of agency refusals to institute rulemakings." 812 F.2d at 4. The court also explained, however, that "[r]eview under the 'arbitrary and capricious' tag line * * * encompasses a range of levels of deference to the agency, * * * and *Chaney* surely reinforces our frequent statements that an agency's refusal to institute rulemaking proceedings is at the high end of the range." *Id.* at 4-5 (citation omitted).

constitutes a reversal of the agency's former views as to the proper course." *Ibid.* The Court concluded that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* at 42. That statement logically implies that an agency's refusal to initiate rulemaking should be reviewed under a more deferential standard than would apply to an agency's alteration of its regulatory scheme.

B. Section 202(a)(1) Of The CAA Does Not Impose Any Timetable For Determining Whether Greenhouse Gas Emissions From New Motor Vehicles Would Meet The Statutory Endangerment Standard

Under background principles of administrative law, agencies are presumptively free to base decisions not to initiate rulemaking on a broad range of discretionary factors. See pp. 36-39, *supra*. In unusual circumstances, however, Congress sometimes limits that customary discretion by (for example) requiring an agency to determine within a particular time period whether specified conditions are satisfied, and to conduct a rulemaking if those conditions are met. In light of general principles of administrative law and the Executive's general discretion under the Take Care Clause of the Constitution, see Art. II, § 3, cl. 4, such limitations should be construed narrowly. See pp. 39-45, *infra*. Petitioners contend (*e.g.*, Br. 35-36) that, under Section 202(a)(1) of the CAA (42 U.S.C. 7521(a)(1)), the *only* factor EPA could properly consider in determining whether to grant their petition for rulemaking was whether greenhouse gas emissions from new motor vehicles meet the statutory standard for endangerment of public health or welfare. That claim lacks merit.

1. Section 202(a)(1) provides in pertinent part:

> The Administrator *shall* by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which *in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. 7521(a)(1) (emphasis added). The use of "shall" indicates that, *if* EPA "in [its] judgment" determines that particular pollutant emissions from new motor vehicles cause air pollution that "may reasonably be anticipated to endanger public health or welfare," the agency must "prescribe * * * standards."

Petitioners, however, do not contend that EPA has made a determination that the statutory endangerment standard is satisfied, thereby triggering a mandatory duty to issue standards, and yet has nevertheless declined to regulate.[16]

---

[16] With respect to the source of EPA's purported obligation to prescribe standards in this area, the petition for rulemaking alleged that the agency had *previously* determined that the endangerment standard was satisfied. See J.A. 16, 18, 21, 35, 41. The principal theory of the rulemaking petition was that, "[h]aving already made formal findings that the emission of [greenhouse gases] from mobile sources poses actual or potential harmful effects [on] the public health or welfare, the Administrator must exercise her authority to regulate the emissions of [greenhouse gases] from new motor vehicles under § 202(a)(1)." J.A. 41 (footnote omitted). In denying the petition for rulemaking, however, EPA explained that none of the materials cited in that petition constituted a formal finding by the Administrator that greenhouse gas emissions satisfy the endangerment standard. Pet. App. A81. EPA further noted that, even "if the Administrator were to find that [greenhouse gases], in general, may reasonably be anticipated to endanger public health or welfare," it would not necessarily follow that greenhouse gas emissions *from motor vehicles* satisfy the endangerment standard set forth in Section 202(a)(1). See *ibid.* In this Court, petitioners do not press the contention that the Administra-

Rather, petitioners' argument (*e.g.*, Br. 38) is that the agency acted unlawfully by denying the rulemaking petition *without* deciding whether greenhouse gas emissions from new motor vehicles "may reasonably be anticipated to endanger public health or welfare." Nothing in Section 202(a)(1), however, requires EPA to make such a determination at any particular time. To the contrary, the provision emphasizes the Administrator's ability to exercise his "judgment," which presumably includes the judgment that this issue is not yet ripe for determination. Thus, absent a formal judgment by the Administrator that greenhouse gas emissions from new motor vehicles can be expected to cause endangerment, the agency retained its traditional flexibility to base its denial of the rulemaking petition on a broad range of discretionary factors.[17]

Adherence to the plain terms of Section 202(a)(1) produces a sensible result. Use of the word "shall" in Section 202(a)(1) reflects a congressional judgment that, once EPA has devoted the resources necessary to determine whether

---

tor has *already* made the sort of formal endangerment finding that would trigger the duty to prescribe standards under Section 202(a)(1).

[17] While arguing that EPA was required to resolve the question of endangerment, petitioners do not specify when or how that duty to decide arose. Petitioners recite the statutory endangerment standard and construe Section 202(a)(1) to require "that the Administrator 'shall' regulate air pollutants satisfying this criterion." Pet. Br. 36. That formulation suggests that EPA is in breach of its statutory obligations whenever the agency has failed to prescribe standards for particular motor-vehicle pollutant emissions that *in fact* "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). In addition to imposing a duty of omniscience that no agency could satisfy, that construction of Section 202(a)(1) would render the phrase "in his judgment" superfluous. Alternatively, petitioners might contend that EPA's purported obligation to decide the endangerment question was triggered by the filing of ICTA's petition for rulemaking. But since nothing in the CAA provides for the filing of a rulemaking petition in these circumstances, it is difficult to see how ICTA's petition could narrow the regulatory options previously available to the agency.

particular emissions cause air pollution that may reasonably be anticipated to endanger the public health or welfare, and has concluded that the statutory endangerment standard is satisfied, the directive that EPA must prescribe standards is an acceptable constraint on the agency's usual rulemaking discretion. But requiring the agency to conduct the necessary inquiries and to determine *whether* the endangerment standard is satisfied with respect to a potentially unbounded range of pollutants, even when EPA has concluded for other reasons that regulation of particular emissions is unwarranted, would entail a much more severe intrusion on the agency's customary flexibility to set its own priorities. Absent a clear indication in the statutory text, this Court should not infer that Congress intended to mandate so sharp a departure from background principles of administrative law. And, because Section 202(a)(1) is at a minimum ambiguous on this issue, EPA's reasonable interpretation of the statutory language is entitled to deference under *Chevron*.

2. The statutory scheme as a whole reinforces the literal interpretation of Section 202(a)(1). Some provisions of the CAA specify deadlines by which EPA is to study analogous "endangerment" questions.[18] Others provide specific direction for presentation and consideration of petitions and other types of submissions to the agency.[19] And while the Act di-

[18] See, *e.g.*, 42 U.S.C. 7408(a)(1) (regarding initial list of criteria pollutants); 42 U.S.C. 7411(b)(1)(A) (regarding initial list of categories of stationary sources); 42 U.S.C. 7547(a), 7548 (regarding studies of nonroad engines and vehicle emissions and motor vehicle particulate matter emissions, respectively).

[19] See, *e.g.*, 42 U.S.C. 7407(d)(3) (process and timing for redesignation of air quality control regions), 7410(k) (process and timing for EPA review of state implementation plan submissions), 7411(g) (substantive and timing criteria for applications by States for revision of new source performance standards and EPA responses thereto), 7412(b)(3) and (4) (timing and other requirements relating to petitions to modify the CAA list of hazardous pollutants and agency responses thereto), 7585(b)(2) (six-month deadline to respond to any petition

rects EPA to review and (as may be appropriate) revise existing NAAQS at five-year intervals, 42 U.S.C. 7409(d)(1), Section 202(a)(1) simply directs EPA to revise mobile source emission standards "from time to time." 42 U.S.C. 7521(a)(1); cf. *American Lung Ass'n* v. *Reilly*, 962 F.2d 258, 263 (2d Cir. 1992) (contrasting statutorily-prescribed "indefinite intervals, such as 'from time to time,'" with "bright-line deadlines" such as "at five-year intervals"). The existence of other CAA provisions that establish specific deadlines or require the agency to respond to submissions from private parties highlights the absence of any similar requirement in Section 202(a)(1). See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

3. Consistent with the foregoing principles, the full District of Columbia Circuit explained 30 years ago that the "express provision for administrative discretion via the 'judgment' phrase [in Section 202(a)(1) of the CAA] is necessary" precisely because Section 202(a)(1) requires EPA to initiate rulemaking once it makes a determination of "endanger-[ment]" to health or welfare. *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 20 n.37 (en banc), cert. denied, 426 U.S. 941 (1976). Other court of appeals decisions have recognized that EPA possesses broad discretion to decide whether and when to make analogous threshold regulatory determinations under similarly structured provisions of the CAA.[20] The District of Co-

---

seeking a determination that criteria for revised standards for certain vehicles have been met), 7661d(b)(2) (process relating to petitions objecting to state CAA operating permits).

[20] See *New York Pub. Interest Research Group* v. *Whitman*, 321 F.3d 316, 330-331 (2d Cir. 2003) (EPA has discretion whether or not to make the threshold "determination" regarding deficiencies in state operating permit programs under Section 502(i) of the Act, 42 U.S.C. 7661a(i)); *Her Majesty the Queen in Right of Ont.* v. *United States EPA*, 912 F.2d 1525, 1533-1535 (D.C. Cir. 1990) (EPA has discretion to determine whether and when to make the threshold finding under Section 115(a) of the Act, 42 U.S.C. 7415(a), as to the existence of "reason to believe" that emissions from sources in the United

lumbia Circuit has held, in particular, that EPA may properly defer making an endangerment determination while it waits for additional scientific and technical studies to be completed. See *Her Majesty the Queen in Right of Ont.* v. *EPA*, 912 F.2d 1525, 1533-1534 (1990). EPA's construction of Section 202(a)(1) is thus consistent not only with generally applicable background principles of administrative law, but with appellate decisions applying those principles to the CAA.

4. As noted above (see notes 1 & 9, *supra*), EPA's determination that it lacks authority to regulate greenhouse gas emissions to address global climate change reflects a departure from the position taken by two prior EPA general counsels. EPA's discretionary decision not to exercise any authority it might possess, however, is fully consistent with previous agency pronouncements under prior Administrators. In 1999 and 2000, EPA informed Congress that, while it construed the CAA to authorize regulation of greenhouse gas emissions, it had no present intention of exercising that authority. See J.A. 80, 91, 101, 106, 108. The agency stated that "[t]he use of EPA's legal authorities involves adherence to specified legal and technical procedural steps, *as well as discretion as to when to initiate applying this additional authority*." J.A. 106 (emphasis added). The agency further explained that, "[a]s EPA has no current plans to propose regulations for [carbon dioxide], EPA has not evaluated the strength of the technical and legal basis for [endangerment] findings under any particular provision of the Act." J.A. 91. Those statements (which were made after ICTA's petition for rulemaking had been filed with the agency) unambiguously reflect EPA's

---

States are endangering health or welfare in another country); *NRDC* v. *Thomas*, 885 F.2d 1067, 1073-1075 (2d Cir. 1989) (EPA has discretion in exercising its "judgment" as to whether emissions of hazardous air pollutants "may reasonably be anticipated" to result in certain types of illnesses under then-existing version of CAA Section 112(a)(1), 42 U.S.C. 7412(a)(1) (1988)).

consistent position that it is under no legal obligation to determine, on any particular timetable, whether greenhouse gas emissions satisfy the endangerment standard.

C. EPA's Denial Of The Rulemaking Petition In This Case Reflects A Reasonable Exercise Of Agency Discretion

Based on a variety of considerations, EPA concluded that, even if the CAA authorized it to regulate greenhouse gas emissions from new motor vehicles for the purpose of addressing global climate change, the agency would decline to exercise that authority at the present time. Petitioners' challenge to that discretionary decision is premised solely on their contention that Section 202(a)(1) of the CAA required the agency to determine, based on scientific evidence alone, whether such emissions may reasonably be anticipated to endanger public health or welfare. Because Section 202(a)(1) imposes no such requirement, EPA's denial of the rulemaking petition in this case should be sustained. Even assuming that EPA's balancing of the relevant discretionary factors was subject to judicial review at all, EPA's denial of the rulemaking petition was wholly rational and easily satisfies the deferential standard of review that courts have applied to agency refusals to undertake regulatory activity.[21]

1. It is undeniable that the "science of climate change is extraordinarily complex and still evolving." Pet. App. A83. As the court of appeals recognized, EPA properly relied upon an authoritative analysis by the National Research Council (NRC) as supporting the agency's view that any decision whether to regulate in this area would be better made after

---

[21] Because EPA's exercise of discretion clearly satisfies such standard of review, this Court need not resolve the question left open in *Chaney* as to whether an agency's decision not to invoke rulemaking in such circumstances is subject to judicial review at all. *Chaney*, 470 U.S. at 825 n.2.

further research was conducted into critical areas of current scientific uncertainty. See *id.* at A11-A13, A83-A85. The NRC concluded that "[g]reenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise." J.A. 151. As EPA highlighted, however, the NRC further observed that "[t]he understanding of the relationships between weather/climate and human health is in its infancy and therefore the health consequences of climate change are poorly understood." Pet. App. A84.

Consistent with the NRC report, EPA explained:

> [P]redicting future climate change necessarily involves a complex web of economic and physical factors including: our ability to predict future global anthropogenic emissions of [greenhouse gases] and aerosols; the fate of these emissions once they enter the atmosphere (e.g., what percentage are absorbed by vegetation or taken up by the oceans); the impact of those emissions that remain in the atmosphere on the radiative properties of the atmosphere; changes in critically important climate feedbacks (e.g., changes in cloud cover and ocean circulation); changes in temperature characteristics (e.g., average temperatures, shifts in daytime and evening temperatures); changes in other climatic parameters (e.g., shifts in precipitation, storms); and ultimately the impact of such changes on human health and welfare (e.g., increases or decreases in agricultural productivity, human health impacts).

Pet. App. A83-A84.

EPA then identified five specific areas of ongoing research that would be necessary to reduce "the wide range of uncertainty inherent in current model predictions." Pet. App.

A84.[22] Those studies are ongoing and are expected to be completed in the next few years. EPA further explained that the President's comprehensive global climate change strategy is based on a wide variety of policy tools to address climate change through a "sustained effort, over many generations." *Id.* at A85. Those measures include tax incentives, public-private partnerships, and major technology research, development, and deployment initiatives that would reduce the economy's reliance on fossil fuels, supported by the President's 2003 budget request for $4.5 billion for programs related to global climate change. *Id.* at A88-A91. Because "establishing [greenhouse gas] emission standards for U.S. motor vehicles at this time would require EPA to make scientific and technical judgments without the benefit of the studies being developed to reduce uncertainties and advance technologies," *id.* at A85, the agency reasonably concluded that, "[u]ntil more is understood about the causes, extent and significance of climate change and the potential options for addressing it, * * * it is inappropriate to regulate [greenhouse gas] emissions from motor vehicles," *id.* at A86.[23]

---

[22] Those areas of research were (1) "[t]he future global use of fossil fuels and future global emissions of methane"; (2) "[t]he fraction of fossil fuel carbon that will remain in the atmosphere and contribute to radiative forcing versus exchange with the oceans or with the land biosphere"; (3) "[t]he impacts (either positive or negative) of climate change on regional and local systems"; (4) "[t]he nature and causes of natural variability of climate and its interactions with human-induced changes"; and (5) "[t]he direct and indirect effects of the changing distribution of aerosols." Pet. App. A84.

[23] As petitioners correctly explain (Br. 41-42), EPA's broad discretion under Section 202 of the CAA includes the authority to regulate notwithstanding the existence of some scientific uncertainty as to the likely effects of particular categories of emissions. See *Ethyl*, 541 F.2d at 27-28. The fact that EPA *may* regulate in the face of uncertainty, however, does not preclude the agency from deferring regulation pending the acquisition of additional information.

2. EPA also properly took account of other legal and policy implications of any decision to undertake the requested regulatory action. See Pet. App. A13-A14. EPA explained that initiation of the proposed rulemaking would

> result in an inefficient, piecemeal approach to addressing the climate change issue. The U.S. motor vehicle fleet is one of many sources of [greenhouse gas] emissions both here and abroad, and different [greenhouse gas] emission sources face different technological challenges in reducing emissions. A sensible regulatory scheme would require that all significant sources and sinks of [greenhouse gas] emissions be considered in deciding how best to achieve any needed emission reductions.

Id. at A85-A86. The agency also properly considered the present dearth of practical mechanisms to address greenhouse gas emissions from motor vehicles, particularly given DOT's statutory responsibility for establishing fuel-economy standards. Pet. App. A86-A87; see *Her Majesty the Queen*, 912 F.2d at 1533-1534 (recognizing that consideration of available "remedial procedures" is appropriate in deciding whether to make an endangerment finding under Section 115 of the Act, 42 U.S.C. 7415).

3. EPA also expressed reservations about the foreign policy implications of any unilateral attempt to set domestic greenhouse gas emission standards at this time.[24] The agency

---

[24] Petitioners and their amici suggest that it was inappropriate for EPA to consider the potential international implications of regulating greenhouse gases. But EPA has direct familiarity with the Executive's foreign policy on global climate change. In addition, EPA is periodically involved in discussions with the Department of State on this issue, and the two agencies have entered into multilateral and bilateral agreements with other countries on matters relating to global climate change. See<http://www.epa.gov/climatechange/policy/internationalcooperation.html> (visited Oct. 24, 2006). Moreover, Congress has specifically recognized EPA's familiarity with such

observed that unilateral regulation could "weaken U.S. efforts to persuade key developing countries to reduce the [greenhouse gas] intensity of their economies," and that "[a]ny potential benefit of EPA regulation could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions." Pet. App. A86. Those concerns were premised in part on EPA's experience with efforts to control the phenomenon of stratospheric ozone depletion. See *id.* at A86 n.5; note 7, *supra*. Particularly given the complexity and global nature of the climate change issue, it would be inappropriate for a court to set aside the Executive Branch's judgment as to the likely effects of domestic regulation on its active efforts to encourage the reduction of greenhouse gas emissions in foreign countries—where the vast majority of worldwide greenhouse gas emissions are produced.

4. Finally, the considerations that led EPA to conclude that it lacks regulatory authority in this sphere further support the reasonableness of the agency's decision not to exercise any such power that it might possess. The agency explained that key CAA regulatory mechanisms are ill-suited to greenhouse gas emissions (see pp. 23-25, *supra*); that current congressional policy favors further study and assimilation of data as a predicate for future legislation or international agreements (see pp. 26-31, *supra*); and that the economic and political significance of greenhouse gas regulation counsels hesitation in the absence of clear congressional guidance (see pp. 31-32, *supra*). Even if EPA is found to possess authority

---

international efforts. In the Global Climate Protection Act of 1987, for instance, Congress directed EPA to submit, "jointly" with the Secretary of State, an "assessment of United States efforts to gain international cooperation in limiting global climate change," and "a description of the strategy by which the United States intends to seek further international cooperation to limit global climate change." § 1104(2) and (3), 101 Stat. 1409 (15 U.S.C. 2901 note).

under current law to regulate greenhouse gas emissions for the purpose of addressing global climate change, those factors would be directly relevant to the agency's discretionary decision whether to exercise such authority. Considering those factors and the others discussed above, there is no basis for the Court to override EPA's judgment and require the agency to undertake regulation in this context.

In sum, this Court need not question the "seriousness" (*Brown & Williamson*, 529 U.S. at 161) of the complex issues surrounding global climate change. But, applying settled principles of administrative law, the Court should defer to the expert agency's judgment that now is not the time to embark on the regulatory path that petitioners desire.

CONCLUSION

The case should be remanded to the court of appeals with instructions to dismiss the petitions for review for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

GREGORY G. GARRE
THOMAS G. HUNGAR
Deputy Solicitors General

MALCOLM L. STEWART
Assistant to the Solicitor General

JON M. LIPSHULTZ
Attorney

ROGER R. MARTELLA, JR.
Acting General Counsel

CAROL S. HOLMES
Attorney
Environmental Protection Agency

OCTOBER 2006